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IN THE

Supreme Court of the United States

October Term, 1968

No. 1253

BERNARD WILSON, PETITIONER

versus

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S PETITION FOR REHEARING

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Pursuant to the provisions of Rule 58, paragraph 2, the petitioner Bernard Wilson prays for rehearing of his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. His petition was denied by order of this Court made and entered May 26, 1969.

The petition for rehearing is based upon intervening circumstances of controlling effect and other substantial grounds available to the petitioner, although not previously presented. The latter were to have been the subject matter of a reply brief which was in the hands of petitioner's printer at the time the writ was denied.

In substance the grounds of this petition are the following: (1) one aspect of the decision of this Court in **Leary v. United States,** 37 L.W. 4397 (May 19, 1969); and (2) the circumstance that a State officer participated in the raid which resulted in the arrest of the petitioner, showing that in fact there would have been substantial risk of self-incrimination if petitioner had registered the distillery mentioned in the record and other related matters appearing in the Government's **Brief in Opposition.**

(1)

"Persons inherently suspect of criminal activities . . ."

In the **Leary** decision this Court noted that there were several classes of persons who might lawfully possess marijuana, under specific exceptions provided for in the various state laws relating to marijuana, and that these persons were required to register or were exempt from the registration requirements. This Court went on to say that those persons "who might legally possess marijuana under state law were virtually certain either to be registered under Section 4753 or to be exempt from the order form requirements." (**Leary v. United States,** 37 L.W. 4397, 4400, (subdivision C). And the Court

found that all other possessors who were both unregistered and obliged to obtain an order form constituted "a select group inherently suspect of criminal activities."

The petitioner says that if this principle is applied to enforcement of the Federal distillery registration statutes in Alabama, it must follow **a fortiori** that **all persons** possessing distilleries in Alabama must be considered to be part of a select group inherently suspect of criminal activities, since no one may lawfully possess a distillery in Alabama (Title 29, Sections 75, 131, 133, **Code of Alabama,** 1940).

Undoubtedly the number of distillers throughout the country who willingly register must be considerable, and they are well known. However, the number of moonshine distillers is simply legion, as everyone who has practiced law in the Eastern United States is bound to know. These moonshiners, who operate in secret and in defiance of the law, are the persons against whom the registration statues are intended to apply, and obviously they are a "select group inherently suspect of criminal activity." Though they may be among the "guilty and imprudent,"[1] they are entitled to the protection of the Fifth Amendment.

(2)

"Appreciable hazards of self-incrimination . . ."

The original petition for certiorari did not call to

[1]See *Marchetti v. United States,* 88 S.Ct. 697, 704, headnotes 4 and 5, where it is said, "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted."

the Court's attention the fact that when the distillery described in the record was raided, there was a State officer named Wooten present and assisting the Federal officers (See the Record, Volume I, pages 29 and 77). Wooten was then (and still is) engaged in police work for the State of Alabama, and in particular for the State Alcoholic Beverage Control Board. It is not unusual for state officers to assist Federal officers in the enforcement of the Internal Revenue laws. Presumably, in this instance, it became Wooten's duty to inform the State authorities of the distillery. The Government's statement, in its brief, that petitioner has not been indicted under state law is not supported by the record.

It is argued by the Government that the information required of a registrant is only what is necessary "for efficient administration of a major revenue program." At the same time, the statute calls for every item of information necessary to draw an indictment for violation of the registration statutes, and in particular 26 **U.S.C.** 5601. A reading of the indictment in this case (**Record,** Volume I, page 5) clearly shows that the District Attorney who prepared the indictment adopted much of the precise language of the statute. He needed only to supply time and place.

Beside the point, also, is the Government's argument that the Solicitor-General knows of no instance where evidence furnished by registration of a distillery has been used in a state prosecution. It is doubtful, also, that he knows of any taxpayer who, in the words of Mr. Justice Holmes, has had the temerity to raise the question of whether bribes paid in the carrying on of illegal businesses constitute items of "ordinary and nec-

essary expenses" within the meaning of the income tax laws.[2]

Too, there is no restriction on the use of any information which a registrant might supply in complying with 26 U.S.C. 5179 (a) (1). And the Government in its brief (footnote on page 5) renews its request for the imposition of appropriate restrictions, thus recognizing that compliance with these registration statutes would create "appreciable hazards of self-incrimination."

For the foregoing reasons, the petitioner respectfully prays that the Court reconsider the order of May 26, 1969, denying his original petition and grant the writ prayed for in his original petition.

The undersigned attorneys do hereby certify that this petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in paragraph 2 of Rule 58 of the Supreme Court Rules.

Respectfully submitted this 16 day of June, 1969.

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[2]See *United States v. Sullivan*, (1927) 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037, 51 A.L.R. 1020.

CERTIFICATE OF SERVICE

The undersigned, who is of counsel for the Petitioner, does hereby certify that true copies of the foregoing petition for rehearing were deposited in the United States Post Office with first-class, airmail postage prepaid, addressed to Honorable Erwin N. Griswold, the Solicitor-General of the United States, Department of Justice, Washington, D. C. 20530, and that copies were mailed, first-class postage prepaid, addressed to Honorable Ira DeMent, United States District Attorney for the Middle District of Alabama, Post Office Building, Montgomery, Alabama, this the 16 day of June, 1969.

Fred M McMillan

Of Counsel for the Petitioner